

Remarks:

In the September 11, 2007, Office Action, the Examiner imposed a restriction requirement under 35 U.S.C. Section 121 between the claims of Group I (Claims 1-38), the claim of Group II (Claim 39), the claims of Group III (Claims 40-54), the claim of Group IV (Claim 55), the claims of Group V (Claims 56 and 57), the claim of Group VI (Claim 58), the claim of Group VII (Claim 59), and the claim of Group VIII (Claim 60). The invention of Group I was stated in the September 11, 2007, Office Action to be unrelated to the inventions of each of Groups II, III, IV, V, and VI (Paragraphs 2, 3, 4, 5, and 6, respectively). The invention of Group I was stated in the September 11, 2007, Office Action to be unrelated to the inventions of each of Groups VII and VIII as product and process of use (Paragraphs 7 and 8, respectively).

The invention of Group II and the inventions of Groups III-VIII were stated in the September 11, 2007, Office Action to be unrelated (Paragraph 9). The invention of Group III and the inventions of Groups I, II, and IV-VIII were stated in the September 11, 2007, Office Action to be unrelated (Paragraph 10). The invention of Group IV and the inventions of Groups I-III and V-VIII were stated in the September 11, 2007, Office Action to be unrelated (Paragraph 11). The invention of Group V and the inventions of Groups I-IV and VI-VIII were stated in the September 11, 2007, Office Action to be unrelated (Paragraph 12). The invention of Group VI and the inventions of Groups I-V, VII, and VIII were stated in the September 11, 2007, Office Action to be unrelated

(Paragraph 13). The invention of Group VII and the inventions of Groups I-VI and III were stated in the September 11, 2007, Office Action to be unrelated (Paragraph 14).

The invention of Group VIII and the inventions of Groups I-VII were stated in the September 11, 2007, Office Action to be unrelated (Paragraph 15).

The September 11, 2007, Office Action stated that there would be a serious burden on the Examiner if restriction is not required because the inventions require a different field of search (Paragraph 16). The September 11, 2007, Office Action stated that the inventions have acquired a separate status in the art due to their recognized divergent subject matter (Paragraph 17).

In the September 11, 2007, Office Action and with regard to the claims of Group I, a number of election of species requirement under 35 U.S.C. Section 121 were made:

- A. claims directed to the following allegedly patentably distinct species: " polar lipid: (a) antioxidant; (b) lipid of oat; and (c) oil selected from the oils listed in Claim 4." The species were stated to be independent or distinct "because antioxidant can be a vitamin that is structurally different from lipid of oat or oat oil, and the prior art that anticipates one species may not anticipate the other." This election requirement would be required if the claims from Group I were chosen in response to the restriction requirement.
- B. claims directed to the following patentably distinct species: "soluble fibers: (a) oligosaccharide; and (b) beta glucan." The species were stated to be independent

- or distinct "because beta glucan is polysaccharide that is structurally different from oligosaccharide, and the prior art that anticipates one species may not anticipate the other." This election requirement would be required if the claims from Group I were chosen in response to the restriction requirement.
- C. claims directed to the following patentably distinct species: "nutricine: (a) nucleotides; (b) yeast cell extract; and (c) yeast cell wall." The species were stated to be independent or distinct because "the species are structurally different and the prior art that anticipates one species may not anticipate the other." This election requirement would be required if the claims from Group I were chosen in response to the restriction requirement.
- D. Claims directed to the following patentably distinct species: "additional component to the composition of claim 1: (a) nutricine that stimulates the formation of nucleotides; (b) vitamin E; (c) mineral micronutritional additive; and (d) medication." The species were stated to be independent or distinct because "the species are structurally different and the prior art that anticipates one species may not anticipate the other." This election requirement would be required if the claims from Group III were chosen in response to the restriction requirement.

#### Response to Restriction Requirement

Since Applicants are required to elect a group in response to the restriction requirement, Applicants hereby provisionally elect the claims of Group I (Claims 1-38),

with traverse. Applicants respectfully request reconsideration of the restriction requirement and its withdrawal in view of the following comments.

First, Applicants believe that the inventions in the eight (8) groups are not independent or distinct from each other, as is required in order to impose the restriction requirement. The inventions in the eight (8) groups are clearly not independent from each other. "The term 'independent' (i.e., unrelated) means that there is no disclosed relationship between the two or more inventions claimed, that is, they are unconnected in design, operation, and effect." MPEP Section 802.01. There can be no serious assertion that the inventions in the eight (8) groups are unrelated, since they are clearly closely related.

"Related inventions are distinct if the inventions as claimed are not connected in at least one of design, operation, or effect (e.g., can be made by, or used in, a materially different process) and wherein at least one invention is PATENTABLE (novel and nonobvious) OVER THE OTHER (though they may each be unpatentable over the prior art)." Other than the bare assertion that the inventions in different groups "have different designs," there is no showing that this requirement has been met in the September 11, 2007, Office Action. The Administrative Procedure Act ("APA") requires administrative agencies such as the U.S. Patent and Trademark Office to present a full and reasoned explanation of its decision, including both its findings and the grounds therefor. "Sound administrative procedure requires that the agency apply the law in accordance with

statute and precedent. The agency tribunal must make findings of relevant facts, and present its reasoning in sufficient detail that the court may conduct meaningful review of the agency action." In re Lee, 277 F.3d 1338, 1346, 61 USPQ2d 1430, 1435 (Fed. Cir. 2002). Applicants acknowledge the implied assertion in the September 11, 2007, Office Action that the inventions of the eight (8) groups are patentably distinct from each other. Applicants expect that if the restriction requirement is maintained that claims directed to non-elected inventions in related applications will not be subject to double patenting rejections.

Second, the statement in Paragraph 16 of the September 11, 2007, Office Action that "there would be a serious burden on the examiner if restriction is not required because the inventions require a different field of search" appears to be completely incorrect in view of the statements in Paragraph 1 that the inventions in each of the eight (8) groups are classified in Class 424, Subclass 439. It is readily apparent that each of the eight (8) allegedly distinct inventions would in fact not require a different field of search. The additional statement in Paragraph 17 of the September 11, 2007, Office Action that "there would be a serious burden on the examiner if restriction is not required because the inventions have acquired a separate status in the art due to their recognized divergent subject matter" is conclusory and completely unsupported. Accordingly, Applicants believe for these additional reasons that the restriction requirement is incorrect and respectfully request its withdrawal.

Third, Applicants note that the subject matter of the claims parallels in many regards the subject matter of parent U.S. Patent Application No. 10/435,367, filed on May 9, 2003, the claims of which have already been searched in their entirety several times. The present patent application, which is a continuation-in-part, most significantly adds a protein concentrate supplement to the elements of the '367 Application. The Examiner of the present patent application is also the Examiner of the '367 Application. As such, the Examiner is very well familiar with the subject matter of the '367 application which is related to the claims of the present invention. A comparison of the claims originally filed in the '367 Application with the claims filed in the instant patent application will demonstrate this fact. For this reason as well, Applicants urge that the restriction requirement is incorrect and respectfully request its withdrawal.

#### Response to Election Requirement

Applicants respectfully traverse the election requirement imposed in the September 11, 2007, Office Action and request reconsideration by the Examiner for the following reasons. The September 11, 2007, Office Action in each of the four (4) election requirements states that the species are independent or distinct because "the species are structurally different and the prior art that anticipates one species may not anticipate the other." This is, in and of itself, an insufficient and improper basis for imposition of an election requirement. The September 11, 2007, Office Action has clearly erred in failing to evaluate the patentable distinctness of the species over each

other (from this standpoint it is utterly irrelevant whether prior art that anticipates one species may not anticipate the other) or even whether the species are mutually exclusive to each other.

"In making a requirement for restriction in an application claiming plural species, the examiner should group together species considered clearly unpatentable over each other." MPEP Section 806.04(h) (which is entitled "Species Must Be Patentably Distinct From Each Other). Can it be possible that an "antioxidant," a "lipid of oat," and "oil selected from the oils listed in claim 4" are patentably distinct from each other? Since oat oil is an antioxidant, a lipid of oat, and one of the oils listed in Claim 4, it clearly cannot be possible. This election requirement is thus clearly invalid. Can "nucleotides," "yeast cell extract," and "yeast cell wall" be patentably distinct over each other? The same product could be both a yeast cell wall and a yeast cell extract, and yeast extracts could include nucleotides. This election requirement is also clearly invalid. Applicants respectfully request that these two invalid election requirements be withdrawn.

Can "oligosaccharide" and "beta glucan" be patentably distinct over each other? Rather, they are merely two alternate materials falling under soluble fiber. Can a "nutraceutical that stimulates the formation of nucleotides," "vitamin E," a "mineral micronutritional additive," and a "medication" be patentably distinct over each other? Rather, they are instead merely potential additional elements added under dependent claims. Should the logic that went into the imposition of these two election requirements

be used, by definition all dependent claims in all patent applications that had alternates would be subject to such a rejection, which is absurd. Applicants respectfully request that these two additional election requirements be withdrawn as inappropriate.

Since Applicants are required to elect species in response to the election requirements, Applicants hereby provisionally elect, with traverse:

- A. (c) oil selected from the oils listed in Claim 4. Since Applicants have selected this species, if the election requirement is maintained, only Claims 2 and 3 could be argued to fall outside the election. Thus, Claims 1 and 4-38 are readable under this election.
- B. (b) beta glucan. Since Applicants have selected this species, if the election requirement is maintained, only Claim 10 could be argued to fall outside the election. Thus, Claims 1-9 and 11-38 are readable under this election.
- C. (a) nucleotides. Since Applicants have selected this species, if the election requirement is maintained, only Claims 19-23 and 24-26 could be argued to fall outside the election. Thus, Claims 1-18 and 27-38 are readable under this election.

Claim 1-60 remain pending. Consideration of the claimed subject matter is respectfully requested, with an early and favorable decision being solicited. Should the Examiner believe that the prosecution of the application can be so expedited, the



Examiner is requested to call Applicants' undersigned attorney at the number listed below.

Respectfully submitted:

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